THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-000328

Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer, Appellant,

v.

DEH Disaster Recovery, LLC; Ceres Environmental Services, Inc.; Beaufort County, A Political Subdivision of the State of South Carolina; Ryan Colter Stoltz; Matt T. Dotson; Tim Tod Dotson; Brandi Dotson; Spencer A. Olson Trucking, LLC; Byers Products, Co.; And TruckPro, LLC, Defendants,

of which Ceres Environmental Services, Inc. and Beaufort County, A Political Subdivision of the State of South Carolina, are the Appellants-Respondents,

and Spencer A. Olson Trucking, LLC, DEH Disaster Recovery, LLC, and Ryan Colter Stoltz are the Respondents.

FINAL BRIEF OF APPELLANTS-RESPONDENTS

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INTRODUCTION

The Appellants-Respondent Ceres Environmental Services, Inc. ("Ceres") accepted the tender of defense from Beaufort County for the above-captioned lawsuit pursuant to its storm debris clean-up contract (R. p. 185) and, in this brief, for simplicity, any reference to "Ceres" shall also incorporate Beaufort County by reference, unless otherwise specified.

The Plaintiff sued Ceres based upon an accident involving Ceres' downstream subcontractors, Respondents Spencer A. Olson Trucking, LLC, ("Olson"), DEH Disaster Recovery, LLC, ("DEH"), and Ryan Colter Stoltz ("Stoltz"). Ceres asserted indemnity cross claims against Olson, DEH, and Stoltz. Those Defendants secretly negotiated a settlement between themselves and Plaintiff, and Ceres was not involved in those negotiations or the settlement (R. p. 253). Pursuant to that settlement, Plaintiff filed a Third-Amended Complaint on March 5, 2021, in which it eliminated all claims against Olson, DEH, and Stoltz (R. p. 201).

Not surprisingly, Olson, DEH, and Stoltz desired to exit this lawsuit completely through that settlement. But they ignored the active indemnity cross claims by Ceres in that settlement process, and moved for summary judgment against Ceres. Despite the fact that Ceres had no part in that settlement and received no consideration for the dismissal of its indemnity claims, the Lower Court granted those Summary Judgment Motions (hereinafter, individually, those Orders are referred to as the "Olson SJ Order," R. p. 8; and the "DEH-Stoltz SJ Order," R. p. 1).

Ceres filed its Notice of Appeal and hereby appeals those Summary Judgment Orders (R. p. 287) because the Lower Court had no authority to involuntarily dismiss Ceres' indemnity claims. The fact that the Plaintiff does not include downstream parties such as Olson, DEH, and Stoltz in a lawsuit has no bearing on whether those parties are obligated to indemnify Ceres, which was the prime contractor for those parties. At the hearing for the Summary Judgment Motions (R. p. 3257), the hearing on Ceres' Motion to Reconsider (R. p. 3428), and in Ceres' supporting Memoranda for those motions (R. pp. 314, 343), Ceres presented a genuine issue of material fact sufficient to defeat summary judgment pursuant to Rule 56, SCRCP. That genuine issue of material fact is whether the acts or omissions of Olson, DEH, and Stoltz caused or contributed to the death of Plaintiff Susan Shaffer, and led to the Plaintiff's claims against Ceres.

The Lower Court's Orders (R. pp. 1, 8) must be reversed because even if, *arguendo,* the indemnity clause in the Ceres-Olson Subcontract (R. p. 3568) contained unenforceable terms, its severability clause requires those terms to be removed and the remaining indemnity obligations to be enforced. When viewed in the light most favorable to Ceres, the evidence in the Record establishes a genuine issue of material fact, and Ceres must present its indemnity claims at trial as it seeks damages resulting from the acts and omissions of Olson, DEH, and Stoltz.

While the Third-Amended Complaint removed the vicarious liability cause of action against Ceres, the existence of a vicarious liability cause of action by a Plaintiff is not an element of a cause of action for Ceres' indemnity claims against third parties. If Plaintiff had this "veto authority" over indemnity claims by a Defendant against third parties, the entire concept of indemnity in South Carolina would be eviscerated.

Despite the Plaintiff's settlement of its claims with Olson, DEH, and Stoltz, Ceres is entitled to pursue its indemnity claims against those entities to determine whether the acts and

omissions of those parties resulted in liability and damages to Ceres. Those Summary Judgment Orders (R. pp. 1, 8) resulted in the dismissal with prejudice of Ceres' indemnity claims, without any consideration to Ceres and without any valid adjudication of those indemnity claims. Accordingly, those Summary Judgment Orders (R. pp. 1, 8) must be reversed.

STATEMENT OF THE CASE

The case involves the storm clean-up efforts in Beaufort County, South Carolina following Hurricane Matthew, which struck in September of 2016. Beaufort County engaged Ceres as the prime contractor to clean up the storm debris (R. p. 3499). Ceres subcontracted with Olson (R. p. 3568), and Olson engaged DEH to provide hauling services (R. p. 3592). Stoltz was an employee of DEH who was the driver of a DEH truck on May 3, 2017. As Stoltz drove a truck with an attached storm-debris trailer on U.S. Highway 21 in Beaufort County, the storm-debris trailer became detached from the truck. The trailer veered into oncoming traffic, and Susan Shaffer was killed instantly when that trailer collided with her vehicle (Verified Petition of Mark Shaffer at para. 2; R. p. 254).

In late 2020, Plaintiff negotiated with Olson, DEH, and Stoltz, and those parties reached a settlement on Plaintiff's claims against them on November 25, 2020 (R. p. 254). Ceres was not made aware of those negotiations; had no part in the settlement process; and did not have any input into the settlement or its resulting documentation. To this date, there has been no disclosure of the exact amounts paid in settlement by Olson, DEH, and Stoltz, as the only disclosure was the aggregate amount of $1,150,000 paid by those parties to Plaintiff. (R. p. 254).

In the Orders granting summary judgment (hereinafter, the "Olson SJ Order," R. p. 8; and the "DEH-Stoltz SJ Order," R. p. 1), Circuit Judge Robert Bonds (hereinafter, the "Lower Court") ruled that because Plaintiff settled with Olson, DEH, and Stoltz, and then dropped its vicarious

liability claims against Ceres, the active indemnity cross claims by Ceres were invalidated and could be involuntarily dismissed. (R. pp. 1, 8).

There is no South Carolina statute or case law which provides the authority for the Lower Court to involuntarily dismiss those pending cross claims by Ceres against Olson, DEH, and Stoltz. The Orders granting summary judgment were, therefore, in error and must be reversed, and Ceres must be allowed to pursue its cross claims against Olson, DEH, and Stoltz.

Note that after the Lower Court granted the Summary Judgment Motions of Olson, DEH, and Stoltz, (R. pp. 1,8), Judge Bentley Price heard Ceres and Beaufort County's Joint Motion for Summary Judgment against the Plaintiff. Judge Price granted that Motion for Summary Judgment (R. p. 26), and Plaintiff has appealed that ruling (R. p. 3498). Plaintiff's appeal and the present appeal of Judge Bonds' orders were consolidated, *see* Letter Directing Consolidation of Appeals (R. p. 3497), and Ceres is responding to Plaintiff's Appeal by separate brief. It is Ceres' position that even though Plaintiff's claims against it were properly dismissed by Judge Price, Ceres suffered damages prior to that dismissal for the defense expenses associated with those claims, and there is no justification to deny Ceres' right to pursue its indemnity claims against Olson, DEH, and Stoltz.

STANDARD OF REVIEW

The question for the Court is whether, under Rule 56(c), SCRCP, in the light most favorable to Ceres, and with every doubt resolved in its favor, the evidence establishes a genuine issue of material fact which should be submitted to the jury for its determination. When the non-moving party establishes that there is a genuine issue of material fact regarding the underlying claim, the Court must deny the motion for summary judgment. Rule 56(c), SCRCP; *Davenport v. Island Ford, Lincoln, Mercury, Inc.*, 320 S.C. 424, 426 (Ct. App. 1995).

Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112 (1991). In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the non-moving party. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C 234, 241 (Ct. App. 2009). Summary judgment should not be granted ***even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom***. *MacFarlane v. Manly*, 274 S.C. 392, 395 (1980) (emphasis added).

"To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc*., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)

As set forth in *Walterboro Community Hospital v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011): "Equitable indemnity is an action in equity. *See Verenes v. Alvanos*, 387 S.C. 11, 18 n. 6, 690 S.E.2d 771, 774 n. 6 (2010) (noting a cause of action for equitable indemnity is necessarily equitable in nature); *Loyola Fed. Sav. Bank v. Thomasson Props*., 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct.App.1995) (same)." *Meacher*, 392 S.C. at 484, 709 S.E.2d at 73.

The *Meacher* Court continued: "'In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence.' *Goldman v. RBC, Inc*., 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006)." Rule 52(a), SCRCP, provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)," so it is not necessary for the Court to make the order as formal as that after a non-jury trial. Nonetheless, in its Summary Judgment Orders subject to this Appeal (R. pp. 1, 8), the Lower Court made findings of fact. The Lower

Court's Orders disregarded the nature of the contractual and special relationships among the parties, as Ceres demonstrated in its supporting evidence. *See, e.g.* Ceres' Memorandum in Support of Reconsideration (R. p. 343). The appropriate standard of review is, therefore, a *de novo* review of the evidence to determine the existence of a genuine issue of material fact. The existence of any genuine issue of material fact is sufficient to justify the reversal of the Lower Courts Orders.

ARGUMENT

I. The Lower Court Erred in Finding that Spencer Olson Trucking Has No Duty to Indemnify Ceres and Beaufort County According to its Subcontract and S.C. Code Ann. § 32-2-10 (Law. Co-op., as amended)

A. The Settlement Between Plaintiff, Olson, DEH, and Stoltz Does Not Affect Ceres' Indemnity Claim

On November 25, 2020 the Plaintiff accepted the sum of $1,150,000 as settlement from the Defendants Olson, DEH, and Stoltz. Petition for Approval of Settlement (R. p. 254). The Lower Court received no details as to the specific amount that any of those defendants contributed toward that settlement from the Plaintiff's Petition to Approve the Settlement (R. pp. 253-56), because neither Plaintiff nor any of the settling defendants disclosed those details during that Petition for Approval.

The Lower Court had no reason to believe that any portion of that settlement was intended to extinguish all of Plaintiff's claims against Ceres, and there was information to suggest that settlement had any bearing on Ceres' cross claims for indemnity against those settling defendants. Indeed, Plaintiff continued to pursue claims against Ceres after its settlement with Olson, DEH, and Stoltz, *see* the Third Amended Complaint (R. p. 199), and now the Lower Court has eliminated Ceres' legal right to indemnity without any cause, justification, or legal support from statutory or case law. *See* Orders granting Summary Judgment (R. pp. 1, 8).

Ceres suffered actual damages that it was claiming against those parties in its indemnity cross claims. The acts and omissions of Olson, DEH, and Stoltz formed the basis of their settlement with Plaintiff, and it is those same acts and omissions which resulted in Ceres' need to defend the Plaintiff's lawsuit. Ceres was not invited to participate in any settlement negotiations, and was not a party to the settlement between Plaintiff and Olson, DEH, and Stoltz. There was no knowing and voluntary waiver of any rights that Ceres had for indemnity claims against Olson, DEH, and Stoltz. The Lower Court erred in coupling the Plaintiff's dismissal of its vicarious liability claims with the indemnity claims by Ceres against Olson, DEH, and Stoltz. A settlement payment to Plaintiff has no bearing on the unresolved damages claim that Ceres was pursuing against those other settling defendants.

But for the acts and omissions of Olson, DEH, and Stoltz, the accident involving the Decedent Susan Shaffer would not have happened, and there would have been no lawsuit against Ceres. The Lower Court was required to view these facts in the light most favorable to Ceres as the non-moving party, and its failure to do so mandates the reversal of its Summary Judgment Orders (R. pp. 1, 8). Michael Napier is the designated expert witness for the Dotson Defendants in this matter. In his deposition at pp. 19-20 (R. pp. 2950-51), Napier stated that Ceres "was the intermediary between Beaufort County and now Olson Trucking. Olson Trucking then became the intermediary for DEH because they, in essence, a lot of times people use the term in this litigation as 'subcontracted the subcontract.'" While Ceres takes issue with Napier's conclusions and the bases for his testimony, the Plaintiff has elicited that evidence in this case, and that evidence establishes a genuine issue of material fact as to the control that Olson, DEH, and Stoltz had over the trucking operations that led to Ms. Shaffer's death and this lawsuit.

Allowing a Plaintiff, much less the Defendants in an indemnity claim, to dictate whether

a prime contractor such as Ceres may pursue indemnity undermines the entire body of South Carolina law regarding indemnity. Vicarious liability and indemnity claims are separate and distinct causes of action, and indemnity claims do not simply "disappear" when a third party, whether a defendant in a lawsuit or not, is able to reach a settlement with the Plaintiff. Such a policy could easily lead to nefarious dealings between Plaintiffs and third parties and cause a party like Ceres to lose legal rights without its knowledge or consent, and certainly without any consideration or bargained for exchange supporting the release of indemnity rights.

"[A] suit for recovery by a master over against a servant where alleged misconduct of the latter has given rise to vicarious liability. Such a cause of action is well recognized in this State." *Sky City Stores v. Gregg Sec. Svcs., Inc.*, 276 S.C. 556, 558, 280 S.E.2d 807, 808 (1981); citing *Bell v. Clinton Oil Mill*, 129 S.C. 242, 256-257, 124 S.E. 7, 12 (1924); *Addy v. Bolton*, 257 S.C. 28, 33-34, 183 S.E.2d 708, 710 (1971). Ceres never released its indemnity claims against Olson, DEH, or Stoltz, and there is no statutory basis for the involuntary dismissal of those indemnity claims.

The South Carolina Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-50(2) (Law. Co-op., as amended) provides that a release like that between Plaintiff and Olson, DEH, and Stoltz only releases those defendants from any ***contribution*** claims which may be asserted by any other tortfeasor, but it does not provide for any automatic release from any indemnity claims by other tortfeasors. Such an indemnity claim must be adjudicated before the trier of fact to determine the liability and damages to which Olson, DEH, and Stoltz are liable to Ceres in indemnity.

In *Toomer v. Norfolk Southern Ry.*, 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2001) the South Carolina Court of Appeals recognized that "[i]ndemnity is that form of compensation in which a

first party is liable to pay a second party for a loss or damage the second party incurs to a third party." The Court of Appeals continued: "[a] right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Id.* "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Rock Hill Telephone Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005).

Section 15-38-15(D) of the South Carolina Code provides that "[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." Section 15-38-20(F) provides "This chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation."

Section 15-38-50(1) provides that "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

In its Summary Judgment Orders (R. pp. 1, 8), the Lower Court erroneously concluded that once the vicarious liability cause of action was removed in the Third Amended Complaint, there was no longer a claim for indemnity by Ceres against Olson, DEH, or Stoltz. The cause of action for indemnity does not include the existence of a Plaintiff's vicarious liability claim as an element

to the indemnity cause of action. There is no requirement that Ceres be sued for vicarious liability before being able to assert its indemnity claims, and the Lower Court erred in its involuntary dismissal of those claims.

While Olson, DEH, and Stoltz were negotiating their settlement agreement with the Plaintiff (R. pp. 253-56), they had the ability and opportunity to negotiate with Ceres and Beaufort County regarding the indemnity cross claims. Olson, DEH, and Stoltz apparently failed to account for the pending indemnity cross claims, and there is no basis upon which Ceres' indemnity claims can be involuntarily dismissed.

The Ceres-Olson Subcontract was negotiated fairly and was supported by consideration, (R. p. 3568) and there is no basis upon which Olson, DEH, or Stoltz can now unilaterally abandon their duty to indemnify Ceres and Beaufort County. This effort to eliminate the indemnity cause of action in South Carolina is unsupported, unwise, and would have devastating consequences to future litigants that could find themselves suddenly without recourse against those parties with responsibility for the Plaintiff's claims. The Lower Court's Summary Judgment Orders are an attack on the fundamental principles of indemnity, and unfairly extinguished Ceres' ability to hold its downstream subcontractors liable for their acts and omissions.

B. The Concurrent Indemnity Language in the Ceres-Olson Subcontract is Valid and Enforceable Under *Concord & Cumberland*

The Lower Court erred in disregarding a substantial and consequential portion of the contractual indemnity language in the Ceres-Olson Subcontract (R. pp. 3573-75, 3583). By failing to recognize that Olson agreed to indemnify even when liability was concurrent with Ceres (R. p. 3575), the Lower Court misapplied the current precedent within *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018); *citing Laurens Emergency Med. Specialists,*

PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E. 375, 378-79 (2003). Further, the Lower Court failed to recognize the severability clause within the Ceres-Olson Subcontract (R. p. 3568), in which Olson agreed that any unenforceable terms would simply be stricken, and the remaining indemnity obligations would be enforced. (R. p. 3586).

In its Olson SJ Order (R. p. 8) the Lower Court correctly cited the *Concord & Cumberland* case, *supra*, but erred in failing to apply that legal standard to the plain language of the Ceres-Olson Subcontract. The resulting Summary Judgment Orders against Ceres were erroneous and disregarded the intent of the parties.

> Furthermore, "when an indemnity clause purports to relieve an indemnitee from the consequences of its own negligence, our case law requires strict construction of the clause." *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018), reh'g denied (Oct. 18, 2018); citing *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E. 375, 378-79 (2003).
>
> ***"The basic rule is that a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."*** *Id*. at 171; *citing Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E. 56, 57 (Ct. App. 1989). ***The clear and unequivocal standard is to be applied "when an indemnitee seeks indemnification for its own concurrent negligence."*** *Id*. at 172.
>
> Olson SJ Order at p. 6. (emphasis added) (R. p. 13).

In the Olson SJ Order (R. pp. 9-10), the Lower Court even included part of the indemnity language that specifically mentions Olson's acceptance of indemnification for concurrent negligence:

> The Ceres contract with Spencer A. Olson Trucking, LLC, named "Ceres Environmental Master Subcontract Agreement" ("Ceres Agreement"), included an indemnification provision where Spencer A. Olson Trucking, LLC served as the indemnitor and Ceres, the indemnitee. (Exhibit A). Specifically, the Ceres Agreement states:
>
> Subcontractor agrees, to the fullest extent permitted by law, to indemnify, defend, and hold harmless Contractor, the Owner and the project architect and all the employees, agents and representative of each (collectively "Indemnitees") from and against all liabilities … ***the indemnity obligation granted herein in favor of the***

> ***Indemnitees shall include the sole and/or concurrent fault and negligence of any Indemnitee*** . . .
>
> Olson SJ Order at p. 2-3 (emphasis original) (R. pp. 9-10) *quoting* ¶ 4.16 of the Ceres-Olson Subcontract (R. p. 3575).

However, the Lower Court plainly erred in failing to recognize that the provisions of the Ceres-Olson Subcontract quoted above directly express Olson's intent to indemnify Ceres for the "sole and/or concurrent fault and negligence of [Ceres]." *Id.*

"Under South Carolina law, a contract that purports to indemnify an indemnitee for the indemnitee's sole negligence is unenforceable." *Concord & Cumberland*, 424 S.C. at 647, 819 S.E.2d at 170-71, citing S.C. Code Ann. § 23-2-10 (2007). However, the language that the *Concord & Cumberland* Court found to be fatal to indemnity was distinctly different from the language in the Ceres-Olson Subcontract quoted above (R. pp. 9-10). The *Concord & Cumberland* Court clarified the language fatal to indemnity as follows:

> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, ***to the extent caused or alleged to be caused*** in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.
>
> *Concord & Cumberland*, 424 S.C. at 643-44, 819 S.E.2d at 169.

The language emphasized in the passage above, "to the extent caused or alleged to be caused," was what the *Concord & Cumberland* Court specifically found to preclude indemnity for concurrent negligence of the indemnitee. As shown in the Ceres-Olson Subcontract passage quoted farther above, Olson SJ Order at p. 2-3 *quoting* ¶ 4.16 of the Ceres-Olson Subcontract (R. pp. 9-10), there was no such "to the extend caused" language. Instead, the Ceres-Olson Subcontract specifically included language stating that Olson intended to indemnify Ceres for the

"sole and/or concurrent fault and negligence of [Ceres]." (R. p. 3575). It is that plain and unambiguous language that was missing in the agreement analyzed *in Concord & Cumberland*, and that is why there must be a different result in the instant case.

> Specifically, we agree with the Mautz and Braegelmann courts that ***the phrase, "to the extent caused ... in whole or in any part by any negligent act or omission of [Muhler]," limits Muhler's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of *653 Muhler*** and its subcontractors. Muhler's indemnity obligation extends to losses Muhler only causes in part, ***but does not clearly and unequivocally require Muhler **174 to indemnify for the negligence of others that contributed to the same loss.***
>
> *Concord & Cumberland*, 424 S.C. at 652-53, 819 S.E.2d at 173-74.

The Court's concluding language on that issue makes it clear that the indemnity language of the Ceres-Olson Subcontract meets its standards for a broad obligation to indemnify, without the limiting language of "to the extent caused by" and including the specific words "concurrent negligence":

> Arguably, the 2007 Agreement is broader than the Subcontract by claiming Muhler will "unconditionally indemnify" and "pay all damages" ***while omitting the phrase from the Subcontract beginning with "to the extent caused***." However, the 2007 Agreement ***also fails to include any reference to indemnification for Superior's own concurrent negligence***.
>
> *Id.* at 656, 819 S.E.2d at 176.

The full language of the indemnity clause in the Ceres-Olson Subcontract (R. p. 3575) fully meets the standards of the *Concord & Cumberland* case cited above. The Lower Court simply failed to properly apply the case law standard when it relied upon only a portion of the contractual indemnity clause in the Ceres-Olson subcontract (R. p. 14). This Court must, therefore, reverse the Lower Court's decision to grant summary judgment to Olson, DEH, and Stoltz on that basis and allow the genuine issues of material fact as to the extent of damages suffered by Ceres to proceed to trial.

Rule 52(a) provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)," so it is not necessary for the Court to make the order as formal as that after a non-jury trial. Nonetheless, in the Olson SJ Order (R. p. 8), the Lower Court made findings of fact and conclusions of law, which may be reviewed de novo and, for the foregoing reasons, must be reversed.

C. The Concurrent Indemnity Language in the Ceres-Olson Subcontract is Valid and Enforceable Under *D.R. Horton v. Builder's First Source*

The Lower Court erred in its application of *D.R. Horton v. Builder's First Source,* 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018), because that case specifically recognizes that even when a contractual indemnity clause includes some language that is void as against public policy, so long as that clause also includes language that is enforceable, the enforceable portions may not be stricken as they accurately set forth the intent of the parties. The Lower Court compounded its error by ignoring the plain language of the Ceres-Olson Subcontract's severability clause (R. p. 3586). As the Court of Appeals held in *Federal Pacific Elec. v. Carolina Production Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989), "[a] contract of indemnity will be construed in accordance with the rules for the construction of contracts generally."

As demonstrated in the previous section of this Brief, Ceres disagrees that any portion of the indemnification clause within the Ceres-Olson Subcontract (R. pp. 3573-75, 3583) is against public policy or unenforceable pursuant to *Concord & Cumberland, supra*, 424 S.C. at 652-53, 819 S.E.2d at 173-74. Nonetheless, the Lower Court cited to *D.R. Horton v. Builders First Source* in its Orders granting summary judgment to Olson, DEH, and Stoltz (R. pp. 4-5, 13-15), and those orders must be reversed because they are contrary to the plain language contained in the *D.R. Horton* case as discussed below.

In *D.R. Horton v. Builder's First Source, supra,* 422 S.C. at 152, 810 S.E.2d at 45, the South Carolina Court of Appeals recognized that there is nothing impermissible about the portion of Ceres' indemnification clause which requires Olson Trucking to be responsible for its own acts and omissions: "This statute ***allows*** D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton ***for damages caused by BFS or its subcontractors***. To the extent the trial court found ***that aspect of the agreement*** to be against public policy, we disagree." *Id.* (emphasis added).

In its Olson SJ Order, the Lower Court failed to recognize that the *D. R. Horton* Court only excludes the portion of the contractual indemnity clause that purports to indemnify a party for its own negligence. *Id.* The *D. R. Horton* Court did not disregard the entire clause, or the entire contract, as the Olson SJ Order requires. Instead, the *D. R. Horton* Court properly applied the law of contract construction and, in that case, simply deleted the offending portion of that indemnity clause. While Ceres disagrees that its contractual indemnity clause violates public policy or is otherwise unenforceable, the *D.R. Horton* case nonetheless establishes that the contractual indemnity clause upon which Ceres relies is valid and enforceable.

D. The Contractual Indemnity Language in the Ceres-Olson Subcontract is Not Covered Within, or Barred by, S.C. Code Ann. § 32-2-10 (Law. Co-op., as amended)

The acts and omissions of Olson, DEH, and Stoltz caused Ceres and Beaufort County to be brought into this lawsuit. But for those acts and omissions, the accident would not have occurred, and Plaintiff would have no damages or causes of action against Ceres or Beaufort County.

Olson asserted in its motion, and the Lower Court agreed (R. p. 8) that the contractual indemnification language in the Olson Trucking Subcontract is barred as it is against public policy under South Carolina Code Ann. Section 32-2-10 (Law. Co-op. as amended). That assertion is patently incorrect, because that Code Section has no applicability to a debris removal contract

according to its specific language: "Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee . . ." The Ceres-Olson Subcontract does not relate to construction and is, therefore, simply not covered by that code section.

II. The Lower Court Erred in Finding that DEH and Stoltz Have No Duty to Indemnify Ceres and Beaufort County Under Contractual or Equitable Indemnity Principles

A. DEH is Liable to Ceres under Contractual Indemnity

The "Sub-Subcontract" between Olson and DEH (hereinafter, the "Olson-DEH Subcontract") at p. 1 (R. p. 3592) provides as follows:

> Contractor [Olson] and its agents will direct the services and equipment of the Subcontractor [DEH] according to the specifications of the Client [Ceres], and/or government authority [Beaufort County].

DEH carried out its work in this project pursuant to the terms of the Ceres-Olson Subcontract (R. p. 3568) which is specifically designated a "Master Subcontract Agreement" that establishes the framework for the payment and operations of the entities working under Ceres in this project. The Olson-DEH Subcontract (R. pp. 3592, 3602-03) specifically incorporates the payment and operational terms pursuant to the Ceres-Olson Subcontract. Not only is that an incorporation by reference, but the payment directive designated as "Exhibit A-1" is the actual document from Ceres. *Compare* Ceres-Olson Subcontract (R. pp. 3588-89) with Olson-DEH Subcontract (R. pp. 3602-03).

In the light most favorable to Ceres as the non-moving party, the Lower Court was obligated to read the Olson-DEH Subcontract as evidence that DEH entered into the Ceres Master Subcontractor framework for this project, and DEH is, therefore, subject to the specific terms of

the Ceres-Olson Subcontract (R. p. 3568). That Master Subcontract form specifically provides that Olson and, by extension, DEH, are contractually obligated to provide a defense and indemnity to Ceres and Beaufort County. (R. pp. 3573-75, 3583 at Bates number CES 331). Examples of the direct contractual relationship between DEH and Ceres follow below.

The Ceres-Olson Subcontract, as Master Subcontract Agreement, was made a part of the Olson-DEH Subcontract under the following provision (R. pp. 3602-03):

This Agreement made this 21 day of March 2017 ~~2010~~, by and between Spencer A. Olson Trucking, LLC hereinafter referred to as "Contractor" and DEH hereinafter referred to as "Subcontractor" is to define the specific responsibilities of the parties in the execution of the project known as Waterway, in Beaufort, SC.

For the consideration of $5.50 per cubic yard of eligible debris collected, the Subcontractor attests and agrees with the Contractor as follows: (***See Attachment A for Prices***)

Exhibit A-1
Subcontract Pricing Addendum
Disaster Debris Removal and Disposal, Beaufort County, SC Job 3498,
Addendum to Ceres Master Subcontract Agreement

* * *

The undersigned hereby agree to the terms and conditions above. All other terms and conditions of the Master Subcontract Agreement remain in full force and unchanged.

Subcontractor
X_____

Ceres Corporate Officer
X_____

Company Name: **Spencer Olson**
Print Name_____
Company Rep on Site Spencer Olson

Print Name_____

DEH further acknowledged its contractual arrangement with Ceres by the following Waiver and Release for Payment in favor of Ceres and Beaufort County, (R. pp. 3590-91):

WAIVER AND RELEASE FOR PAYMENT

DEH (hereinafter referred to as " 2nd Tier Subcontractor"), hereby releases and gives up any and all claims and rights which 2nd Tier Subcontractor may have against Spencer A. Olson Trucking, LLC ("Subcontractor) and Ceres Environmental Services, Inc., ("Contractor"), Liberty Mutual Insurance Company ("Surety"), and DEH DISASTER RECOVERY, LLC or "Owner") (all these parties, except for 2nd Tier Subcontractor, are hereinafter referred to as "Released Parties"). This Waiver and Release for Payment ("Release") relates to labor and/or material supplied by the Subcontractor under its written agreement ("Subcontract") with Contractor performed pursuant to Contractor's agreement with the Owner, Ceres' Job # 3498, and all modifications) (collectively "the Contract") relating to ***Beaufort Cty, SC*** (the "Project Scope").

Further, the Ceres-Olson Subcontract excerpt below (R. pp. 3574, 3576, and 3583 at Bates pp. CES 330 and CES 332) specifically establishes that sub-subcontractors such as DEH will be subject to the specific contract terms required by Ceres in this project. DEH was on notice of all of the Master Subcontract Agreement terms, and was obligated to carry out those terms the same as any other entity below Ceres in this project. Indeed, DEH's above-noted execution of the Waiver and Release for Payment in favor of Ceres and Beaufort County was carried out strictly in accordance with the waiver and release requirements for Olson, DEH, and all other entities working under Ceres in this project. The directive to DEH within the Ceres-Olson Subcontract includes the following provision (R. pp. 3574, 3576, and 3583):

Ceres Environmental Subcontract Agreement

4.12 Subcontractor shall not subcontract, assign or transfer the performance of this Subcontract or any part thereof without the written consent of Contractor. Subcontractor shall notify the prior Contractor in writing of any assignment of amounts due it, or to become due it, under this Subcontract. Subcontractor agrees that this Subcontract shall be freely assignable by the Contractor and agrees to perform or continue to perform Subcontractor's obligations for the assignee subject to assignee's fulfillment of all Contractor's obligations hereunder. Subcontractor agrees to flow down or make applicable all the obligations of this Subcontract to any entity with whom Subcontractor assigns, transfers or subcontracts any work.

4.24 Subcontractor agrees to require any and all of its subcontractors to assume all obligations and responsibilities under the Subcontract Documents.

Subcontractor shall require the same coverages described herein from any sub-subcontractors. Subcontractor shall be liable to, and shall defend, indemnify, and hold harmless, Contractor for any loss or expense, including reasonable attorneys fees, resulting from Subcontractor's failure to provide or require any insurance coverage described herein.

It is not sufficient for DEH, as a party that signed a contract specifically referencing the Master Subcontract Agreement, to disclaim any knowledge of that Master Subcontract Agreement. Indeed, this is the quintessential genuine issue of material fact that precludes summary judgment

in a matter such as this, and is why the Lower Court erred in granting summary judgment. The Lower Court not only had an obligation to view the facts in the light most favorable to Ceres as the non-moving party, but the intention of the parties entering into the contracts is a genuine issue for the trier of fact.

> [I]t is the general rule that parol evidence is admissible to show the true meaning of an ambiguous written contract. Such a contract is one capable of being understood in more ways than just one, or an agreement unclear in meaning because it expresses its purpose in an indefinite manner. The purpose of all rules of contract construction is to determine the parties' intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.
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> *Klutts Resort Realty, Inc. v. Down'round Dev. Corp., Inc.,* 280 S.C. 80, 88, 232 S.E.2d 20 (1977).

At best, this circumstance constitutes an ambiguity in the Olson-DEH Subcontract, which must be subject to inquiry and determination as to the intent of the parties by the trier of fact. Given that circumstance, the Lower Court's order granting summary judgment must be reversed, and these issues must be presented at trial.

Because DEH is obligated to Ceres under the contractual liability provision within the Master Subcontract Agreement, see Ceres-Olson Subcontract (R. p. 3568), there is no basis upon which the Lower Court can involuntarily dismiss Ceres' contractual indemnity cause of action without consideration to Ceres or adjudication of these issues fully. The South Carolina Contribution Among Joint Tortfeasors Act, S.C. Code Ann. § 15-38-10 *et seq.*, at section 15-38-20(F) states:

> This chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.
>
> S.C. Code Ann. § 15-38-20(F) (Law. Co-op., as amended).

As discussed above, neither Olson, DEH, nor Stoltz can make Ceres' indemnity claims disappear simply by settling with the Plaintiff. Indeed, even though the Lower Court later granted Summary Judgment to Ceres as to Plaintiff's Third-Amended Complaint, and all of Plaintiff's claims against Ceres were thereby dismissed, Ceres still has a claim for indemnity against Olson, DEH, and Stoltz. Ceres suffered damages requiring indemnity by those parties for the defense costs and other damages which Ceres incurred from the time of the original Complaint in 2017 at least until the filing of the Third Amended Complaint in 2021, when the Plaintiff's vicarious liability claims against Ceres were withdrawn. The Lower Court erred in granting the motions for Summary Judgment by Olson, DEH, and Stoltz (R. pp. 1, 8), and those orders must be reversed so that Ceres' cross claims for indemnity may be fully adjudicated at trial.

B. The Relationship between Ceres and Olson, DEH, and Stoltz is a Genuine Issue of Material Fact Relating to Equitable Indemnity

As discussed above, it is Ceres' position that Olson, DEH, and Stoltz are each liable to Ceres pursuant to the contractual indemnity terms in the Ceres-Olson Subcontract (R. pp. 3573-75, 3583), which served as the Master Subcontract Agreement for those parties in this storm debris clean-up project. Nonetheless, those parties are also liable to Ceres under equitable indemnity based upon the special relationship between those entities. On December 9, 2021, the South Carolina Supreme Court decided *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 176, 866 S.E.2d 577 (2021). That opinion reviewed the Court of Appeals' opinion cited as *Stoneledge at Lake Keowee v. Clear View Construction*, 413 S.C. 615, 625, 776 S.E.2d 426, 431 (Ct. App. 2015), and the Supreme Court affirmed in part, reversed in part, and remanded the case back to the circuit court. Nonetheless, the following holdings of the Court of Appeals' decision are not, upon information and belief, overruled or reversed by this new Supreme Court opinion, and are offered for consideration below:

> To recover damages on its equitable indemnity claim, Marick must prove the following: (1) Clear View was at fault in causing Stoneledge's water intrusion damages; (2) Marick has no fault for those damages; and (3) Marick incurred expenses that were necessary to protect its interest in defending against Stoneledge's claim. *See Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013) (stating the elements of equitable indemnity); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (same); *see also Addy*, 257 S.C. at 33, 183 S.E.2d at 709–10 (describing the requirements for proving equitable indemnity).
>
> *Stoneledge at Lake Keowee v. Clear View Construction*, 413 S.C. 615, 625, 776 S.E.2d 426, 431 (Ct. App. 2015) *rev'd on other grounds* by *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 176, 866 S.E.2d 577 (2021).

"[W]hether an agency relationship exists is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." *Johnson v. Arbabi*, 355 S.C. 64, 70 (2003). Further, it must be noted that "questions of agency ordinarily should not be resolved by summary judgment where there are ***any facts*** giving rise to the inference of an agency relationship." *Froneberger v. Smith*, 406 S.C. 37, 50 (Ct. App. 2013) (emphasis added).

The contractual requirements included in the Olson-DEH Subcontract (R. pp. 3592, 3602-03) as further demonstrated in the execution of the Waiver form (R. pp. 3590-91) directed in the Ceres-Olson Subcontract (Ceres Master Subcontract, R. pp. 3573-75, 3683) establishes that the relationship between Ceres and DEH was far from the attenuated one claimed by DEH. Indeed, the Olson-DEH Subcontract establishes that DEH was working along with Olson pursuant to Ceres-Olson Subcontract (Ceres Master Subcontract, R. p. 3568).

These subcontract documents provide evidence which, when viewed in the light most favorable to Ceres as the non-moving party, establishes that summary judgment was improperly granted by the Lower Court, and those orders must be reversed in and Ceres' claims for equitable indemnity against these defendants must proceed to trial.

As noted above in the discussion of contractual indemnity, regardless of whether Plaintiff's Third-Amended Complaint (R. p. 199) asserts any causes of action against DEH following its settlement, Ceres is still entitled to assert its claim for equitable indemnity against DEH, because DEH's own acts and omissions are the basis of Ceres' equitable indemnity claims. DEH's settlement with Plaintiff for its acts and omissions does not extinguish the existence of those acts and omissions. But for the existence of DEH's acts and omissions, the accident would not have occurred, and Ceres would not have been sued in this lawsuit. But for the accident which took the life of the Decedent Susan Shaffer, Plaintiff would have no damages, and without damages, Plaintiff's allegations and claims of Ceres' "sole negligence" in the Third Amended Complaint would fail. Plaintiff's release of its damages claim against DEH does not extinguish the damages suffered by Ceres in having to defend the lawsuit created by DEH's own acts and omissions.

The Court of Appeals in *Stoneledge at Lake Keowee*, *supra,* 413 S.C. at 622-23, 776 S.E.2d at 430 *rev'd on other grounds* by 435 S.C. at 176, 866 S.E.2d at 577, described the claim of equitable indemnity by quoting *Addy,* 257 S.C. at 33, 183 S.E.2d at 709 (stating "where the wrongful act of the defendant has involved the plaintiff in litigation with others ... as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages"); *see also McCoy v. Greenwave Enters., Inc*., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) ("In cases of ... equitable indemnification, 'reasonable attorney['s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.' " (second alteration in original) (*quoting Addy*, 257 S.C. at 33, 183 S.E.2d at 710)).

The wrongful acts asserted against DEH and Stoltz are included in the Transcript of Deposition of Defendant Dotson's expert witness Michael Napier, at p. 121 (R. p. 3052): "And,

so overall, notwithstanding all of the maintenance failures, and the entrustment failures, and the supervisory failures, and the qualifications failure of DEH, DEH took a blind-eye approach to the supervision of Stoltz and his entrustment with the equipment. And DEH's preventable failures collectively and cumulatively are contributing factors for the jury's consideration as it relates to Mr. Stoltz's poor performance at the time of this collision."

Ceres denies the assertions that Napier made against it in his report and deposition but, nonetheless, when read in the light most favorable to Ceres for purposes of this Summary Judgment Motion, the Lower Court was required to deem those allegations against DEH to be true. Under those circumstances, DEH's wrongful act caused the Plaintiff's damages, and DEH, therefore, owes a duty of equitable indemnity to Ceres. While Ceres' claim for equitable indemnity is barred if the trier of fact determines that it is a joint tortfeasor along with DEH in causing the Plaintiff's damages, Napier's testimony above is evidence that it was DEH and Stoltz, and not Ceres, who were at fault. When viewed in the light most favorable to non-moving party, the Lower Court was to deem Ceres to be without fault. Not being a joint tortfeasor, Ceres is entitled to equitable indemnity from Olson, DEH, and Stoltz.

Evidence of Plaintiff's damages, see, e.g., Deposition of Mark Shaffer at pp. 93-94 (R. pp. 2902-03), along with Plaintiff's causes of action for vicarious liability against Ceres prior to the Third-Amended Complaint, must be viewed in the light most favorable to Ceres as the non-moving party. Viewed in that light, the evidence within the Record below including, but not limited to the aforementioned Deposition Transcripts and the Transcripts of Hearings, (R. pp. 3257, 3428), the Lower Court was required to deem the fatal accident to have been caused by the wrongful acts of Olson, DEH, and Stoltz. The fact that Olson, DEH, and Stoltz settled with the Plaintiff does not erase any wrongful conduct which caused Ceres to incur the defense costs and expenses associated

with this case.

Further, the fact that Plaintiff is not asserting a vicarious liability claim against Ceres does not extinguish a claim for indemnity by Ceres against Olson, DEH, and Stoltz as parties whose wrongful conduct caused Ceres' defense costs and other damages. Finally, while Plaintiff asserts a cause of action for negligence against Ceres in the Third-Amended Complaint, any evidence adduced by Plaintiff must be viewed in the light most favorable to Ceres, and that negligence claim does not extinguish Ceres' indemnity claim against Olson, DEH, or Stoltz.

Viewed in the proper light in favor of Ceres, there is a special relationship between and among Ceres, Olson, DEH, and Stoltz which supports Ceres' equitable indemnity claims against those parties. The Lower Court improperly disregarded the genuine issue of material fact relating to the relationship of those parties and the consequences of the wrongful conduct by Olson, DEH and Stoltz. For these reasons, the Lower Court's Olson SJ Order (R. p. 8) and DEH-Stoltz SJ Order (R. p. 1) were in error and must be reversed, and Ceres' cross claims against those parties must proceed to trial.

C. A Special Relationship Existed Among Ceres, Olson, DEH, and Stoltz Which Supports Ceres' Claim of Equitable Indemnity

Although the Plaintiff eliminated the vicarious liability claims against Ceres in its Third Amended Complaint (R. p. 199), it is beyond dispute that the lawsuit which was filed by Plaintiff in 2017 was litigated for nearly four years before the secret settlement between Plaintiff and Olson, DEH, and Stoltz. (R. p. 46). It is throughout that entire period of litigation that Ceres suffered damages from having to defend Plaintiff's claims relating to the negligence and damages Plaintiff alleged against Olson, DEH, and Stoltz. Because there existed a special relationship among Ceres, Olson, DEH, and Stoltz during the storm debris clean-up project in the instant case, Ceres is entitled to equitable indemnification by those parties, and it was error for the Lower Court to ignore

the genuine issue of material fact relating to the special relationship which existed among them.

The South Carolina Supreme Court's ruling in *Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963) stands for the proposition that because the acts and omissions alleged by Plaintiff against Olson, DEH, and Stoltz were imputed as negligence by Ceres, that is an appropriate basis for Ceres' equitable indemnity claims against Olson, DEH, and Stoltz.

Equitable indemnity can be based either upon a special relationship or upon an imputation of one's negligence to another. *Toomer v. Norfolk So. Ry., supra*, 344 S.C. at 490-91, 544 S.E.2d at 636. Because the acts and omissions of Olson, DEH, and Stoltz were imputed to Ceres as its own negligence, Ceres is entitled to assert equitable indemnity from those other parties.

South Carolina law recognizes various legal duties between parties in a wide range of relationships. On one end of the spectrum, there are persons who are unknown to each other, without any personal or significant connection prior to a chance encounter, yet the courts have recognized that the circumstances invoke a legal duty by one in favor the another. S*ee e.g.*, *Hancock v. Mid-South Mgt., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009) (incidental contact creates a duty between invitors and invitees without any prior connections between them); *Wallace v. Owens-Illinois, Inc*., 300 S.C. 518, 389 S.E.2d 155 (Ct. App. 1989) (establishing a duty between a manufacturer of a defective product and an unsuspecting user of that product, despite total absence of prior connections between them). The law recognizes that legal duties can exist between virtual strangers, based only upon the foreseeability of a connection.

At the other end of the spectrum are parties whose formal engagements give rise to the strongest of legal bonds, including fiduciary obligations demanding the highest level of care and duty. *See, e.g. Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011) (attorneys); *Turpin v. Lowther,* 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013) (personal representatives).

Between these two ends of the spectrum lies the "special relationship" between those people who have a connection which leads to a duty of equitable indemnity, defined as follows:

> Courts have traditionally allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. According to the principles of equity, the right exists "whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join."
>
> *Toomer*, 344 S.C. at 490-91, 544 S.E.2d at 636 (footnotes omitted); *quoting Stuck*, *infra,* 279 S.C. at 24, 301 S.E.2d at 553.

Over the years, the South Carolina appellate courts have recognized numerous relationships between people and entities upon which a duty of equitable indemnity arises. *See*, *Fountain v. Fred's, Inc.*, 429 S.C. 533, 839 S.E.2d 475 (Ct. App. 2020) (Retail Tenant and Developer's General Contractor); *McCoy v. Greenwave Enters., Inc.*, 408 S.C. at 357–58, 361, 759 S.E.2d at 139 (Seller and Purchaser of contaminated property where Seller failed to disclose contamination); *First Gen. Servs. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (General Contractor and Subcontractor); *Town of Winnsboro v. Wiedeman-Singleton, Inc*., 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990) *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (General Contractor and Subcontractor); *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990) (Seller of residence and Exterminator); *Stuck v. Pioneer Logging Machinery, Inc*., 279 S.C. 22, 301 S.E.2d 552 (1983) (Seller and Purchaser of defective vehicle); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971) (Landlord and General Contractor).

In *Atlantic Coast Line R.R. v. Whetstone*, *supra,* 243 S.C. at 61, 132 S.E.2d at 172, the Supreme Court examined the relationship between the Railroad and an unrelated contractor that erected scaffolding which injured a third party by being too close to a track. In that instance, both

were joint tortfeasors and neither had the right of indemnity for that reason. However, the Supreme Court, by *dictum*, specifically preserved the notion that equitable indemnity could be invoked by an employer whose employee's wrongful act caused the employer's liability. *Id.* at 71, 132 S.E.2d at 176, citing *Jenkins v. Southern Ry. Co*., 130 S.C. 180, 125 S.E. 912 (1924).

In *Jenkins*, the Court noted that the employer Southern Railway "was held liable, not because he committed the act, for it is clear that he neither committed it, participated in, or ratified it; he is held liable, not negligent or willful, because the servant committed it while about the master's business." *Id*. at 180, 125 S.E. at 915.

Of course, our courts have not left the door open wide for every relationship to qualify for equitable indemnity, and have instead analyzed the connection between the indemnitor and the indemnitee in the nature of a foreseeability analysis. For example, in *Rock Hill Telephone Co. v. Globe Communications, supra,* 363 S.C. at 385, 611 S.E.2d at 235, the telephone company engaged an independent contractor to install telephone lines along a highway. In turn, that independent contractor engaged its own independent subcontractor to actually perform the line installation. The Supreme Court rejected the telephone company's claim for equitable indemnity, implicitly finding that a duty to equitably indemnify by the remote subcontractor was not foreseeable. In his dissent, Justice Pleicones noted that the telephone company "had absolutely nothing to do with the selection of [the subcontractor]." *Id*. at 394, 611 S.E.2d at 239 (Pleicones, J., dissenting).

Interestingly, Justice Pleicones took an entirely different approach to the notion of fairness in that instance, by stating that the more attenuated the connection, the greater the need for equitable indemnity. *Rock Hill Telephone*, 363 S.C. at 394, 611 S.E.2d at 239. Of course, that approach was contrary to the majority's requirement of at least some minimal connection in order

to support equitable indemnity. Indeed, Justice Pleicones' position in that instance went against the overwhelming weight of authority in South Carolina which relies upon foreseeability as an element establishing legal duties. That dissent did not sway the majority because the use of foreseeability as an analytical tool dominates the jurisprudence of torts, and now equitable indemnity, in South Carolina. *See, e.g., Young v. Tide Craft, Inc*., 270 S.C. 453, 242 S.E.2d 671 (1978).

The issue in the present appeal is whether the Lower Court erred in finding that the relationships between Ceres, Olson, DEH, and Stoltz are sufficient to meet this "special relationship" standard. In South Carolina, our appellate courts have invariably answered questions of this nature by looking to the foreseeability of the consequences of one's actions. The majority in *Rock Hill Telephone* held that there was no right of equitable indemnity because the attenuated relationship would not allow the remote subcontractor to foresee an equitable indemnity obligation in favor of the telephone company.

In the instant case, however, Ceres' numerous and significant connections with Olson, DEH, and Stoltz plainly give rise to a foreseeable duty to indemnify the Ceres in connection with Plaintiff's wrongful death claim. The damages allegedly suffered by Plaintiff and, as a consequence, by Ceres, were a foreseeable and natural consequence of the wrongful conduct alleged against Olson, DEH, and Stoltz.

> A reading of any of the host of decisions in this State clearly discloses that the touchstone of proximate cause in South Carolina is foreseeability. . . . The standard by which foreseeability is determined is that of looking to the "natural and probable consequences" of the complained of act. . . . While it is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred, . . . liability cannot rest on mere possibilities. The actor cannot be charged with "that which is unpredictable or that which could not be expected to happen." . . .

Young v. Tide Craft, Inc., *supra*, 270 S.C. at 462-63, 242 S.E.2d at 675-76 (citations omitted); *see also*, *Hancock v. Mid-South Mgt., Inc.*, *supra,* 381 S.C. 326, 673 S.E.2d 801 (2009) (foreseeability creates a duty between invitors and invitees without any prior connections between them); *Wallace v. Owens-Illinois, Inc*., *supra,* 300 S.C. at 518, 389 S.E.2d at 155 (foreseeability establishes a duty between a manufacturer of a defective product and an unsuspecting user of that product, despite total absence of prior connections between them).

Olson, DEH, and Stoltz were responsible for the maintenance and operation of the truck and trailer involved in this accident. See Ceres-Olson Subcontract (R. p. 3568). The failure of the truck and trailer led to this accident and predictably, thus foreseeably, resulted in the Plaintiff's lawsuit against Ceres. Olson, DEH, and Stoltz's liability for equitable indemnity in this instance does not "rest on mere possibilities. [Olson, DEH, and Stoltz must] be charged with 'that which is [predictable] or that which [could be] expected to happen.'" *Young v. Tide Craft, Inc*., *supra*, 270 S.C. at 462-63, 242 S.E.2d at 675-76. *See also Fountain v. Fred's, Inc.*, *supra*, 429 S.C. at 533, 839 S.E.2d at 475 (recognizing retail tenant's relationship with a land developer's general contractor).

Olson, DEH, Stoltz, and Ceres also had a special relationship sufficient to justify Ceres' equitable indemnity cross claims. *Toomer v. Norfolk Southern Ry. Co*., 344 S.C. 486, 491 (Ct. App. 2001). In *Toomer,* the Court of Appeals acknowledged that the indemnitor directed its negligent act against the indemnitee in the *Town of Winnsboro* case, the Court neither recognized nor contemplated such a limitation in that holding. *Id.* In fact, there is no South Carolina authority indicating that carrying out a negligent act against the indemnitee is the only way to establish a special relationship. Such a limitation would be inconsistent with the other South Carolina cases applying equitable indemnity principles.

Indeed, four years after the *Winnsboro* decision, the South Carolina Supreme Court held that a similar relationship gave rise to equitable indemnification even though the indemnitor's negligence was directed against the third party, not against the indemnitee. That 1994 decision was *First Gen. Servs. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994). In that case, Servicemaster allegedly failed to properly restore the third-party homeowners' property, but the Supreme Court nonetheless recognized a special relationship between First General Services, as the general contractor, and Servicemaster, as the subcontractor. That special relationship finding permitted First General to recover from Servicemaster under equitable indemnity.

Instead of narrowing the availability of equitable indemnity, the *First General Services* Court broadened the doctrine. The Court held that the analysis is not against whom the negligence was directed, but is instead "if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong had thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury." *First General Services,* 314 S.C. at 443, 445 S.E.2d at 448 *citing Addy v. Bolton,* 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971).

In fact, the *First General Services* Court even clarifies this point further when it reaches back to the Court of Appeals' opinion in *Town of Winnsboro* to confirm that "[t]he right is created by operation of law 'in cases of imputed fault *or* where *some* special relationship exists between the first and second parties.'" *First General Services,* 314 S.C. at 443, 445 S.E.2d at 448 *citing Town of Winnsboro,* 303 S.C. at 57, 398 S.E.2d at 503 (emphasis added). The "*or*" in the above-quoted sentence establishes that there can be equitable indemnity based on imputed fault, as in *Town of Winnsboro*, or equitable indemnity based on a special relationship, such as the one

presented in the instant case between a Lease Guarantor and a Lessee. *Id.*

The broadening, rather than narrowing, of the bases for equitable indemnity continued in *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). "Traditionally, courts have allowed equitable indemnity in cases of imputed fault *or* where *some* special relationship exists between the first and second parties." *Id.* (emphasis added).

In *Stuck v. Pioneer Logging Machinery, Inc*., *supra,* 279 S.C. at 24, 301 S.E.2d at 553, the South Carolina Supreme Court adopted a broad view under the treatises, and did not contemplate any limitation or requirement of imputed fault: "[A] right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *citing* 41 Am.Jur.2d Indemnity § 2 (1968); 42 C.J.S. Indemnity § 21 (1944).

Indeed, South Carolina Courts have "note[d] that the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. at 60-61, 518 S.E.2d at 305 *citing Stuck*, 279 S.C. at 24, 301 S.E.2d at 553.

At this point in Equitable Indemnity Jurisprudence in South Carolina, there is no bright-line test of what relationships have sufficient connections upon which a duty of equitable indemnity may attach. The foreseeability analysis in this instance is direct: a wrongful failure to ensure that the trailer was properly attached to the truck must give rise to Ceres' equitable

indemnity claims against Olson, DEH, and Stoltz.

The motions for summary judgment as to Ceres' claims for equitable indemnity against Olson, DEH, and Stoltz were improperly granted by the Lower Court and must now be reversed so that Ceres' cross claims may be adjudicated at trial. The relationship between Ceres, Olson, DEH, and Stoltz constitutes a genuine issue of material fact which must be examined by the trier of fact, along with the damages incurred by Ceres in having to defend this lawsuit. S*ee, e.g. Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307.

CONCLUSION

For the foregoing reasons, the Lower Court's Orders Granting Summary Judgment in Favor of Respondents Spencer Olson Trucking, DEH Disaster Recovery, and Ryan Stoltz and against the Appellants-Respondents Ceres Environmental Services and Beaufort County must be reversed, and the claims asserted by Ceres and Beaufort County against the Respondents must proceed to trial on the merits.

Respectfully Submitted,

February 10, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-000328

Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer, Appellant,

v.

DEH Disaster Recovery, LLC; Ceres Environmental Services, Inc.; Beaufort County, A Political Subdivision of the State of South Carolina; Ryan Colter Stoltz; Matt T. Dotson; Tim Tod Dotson; Brandi Dotson; Spencer A. Olson Trucking, LLC; Byers Products, Co.; And TruckPro, LLC, Defendants,

of which Ceres Environmental Services, Inc. and Beaufort County, A Political Subdivision of the State of South Carolina, are the Appellants-Respondents,

and Spencer A. Olson Trucking, LLC, DEH Disaster Recovery, LLC, and Ryan Colter Stoltz are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned, R. Patrick Flynn, Counsel for the above-captioned Appellants-Respondents, hereby certifies that the Final Brief of Appellants-Respondents, which is being filed herewith, complies with Rule 211(b), SCACR.

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Respectfully Submitted,

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